

July 19, 2013

Jim Griffith, Vice Mayor
City of Sunnyvale
540 Saco Terrace
Sunnyvale, CA 94089

Re: Your Request for Advice
Our File No. A-13-072a

Dear Mr. Griffith:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”).¹

Please note that this letter is based on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) In addition, our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict-of-interest laws, such as Government Code Section 1090 or common law conflict of interest.

QUESTIONS

Through your role as Vice Mayor for the City of Sunnyvale:

1. May you participate in a city council decision regarding the proposed Raintree Site's special development permit, rezone and general plan amendment if you own a condominium unit in Danbury Place III, whose southern boundary is slightly within the 500-foot radius of the residential development at issue?
2. May you participate in a city council decision regarding the general plan amendment for only the southern parcel of the Raintree Site if the southern parcel does not fall within the 500-foot radius of Danbury Place III?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

3. May you participate in a separate city council decision regarding the Sares Regis Site by a different developer that falls outside the 500-foot radius of Danbury Place III if Sares Regis and Raintree develop a joint Environmental Impact Report (“EIR”) together?

CONCLUSION

1. You may not participate in a city council decision regarding the proposed Raintree Site's special development permit, rezone or general plan amendment if you own a condominium unit in Danbury Place III, whose southern boundary is slightly within the 500-foot radius of the residential development at issue.
2. You may not participate in a city council decision regarding the general plan amendment for only the southern parcel of the Raintree Site even if the southern parcel does not fall within the 500-foot radius of Danbury Place III because this decision appears to be interlinked to the other Raintree Site decisions.
3. You may participate in the city council decision regarding the Sares Regis Site only if participating in that decision will not result in reopening or in any way affect the decisions on the Raintree Site and will not independently have a material financial effect on your interest as discussed further below.

FACTS

You are Vice Mayor of the city of Sunnyvale and own a residential unit in a condominium complex called Danbury Place III in Sunnyvale, California. A residential development called the Raintree Site, which consists of a northern parcel and a southern parcel, will be seeking approval with the City Council in the near future. The Raintree Site will be seeking a special development permit for the entire site, a rezoning for the entire site and a general plan amendment for only the southern parcel.

The Raintree Site is not within 500 feet of your actual unit. However, as a property owner, you also own an undivided interest in the common areas of Danbury Place III, and the northern boundary of the Raintree Site is slightly within 500 feet of the southern boundary of Danbury Place III

A different project by another developer, the Sares Regis Site, will also be seeking separate entitlements with the City Council in the near future. The Sares Regis Site is across the street from the Raintree Site and is not within a 500-foot radius of either your unit or the Danbury Place III boundary lines. Although the Raintree Site and the Sares Regis Site are not related and seek separate entitlements, the two developers will be developing a joint EIR to assess whether the projects will have a significant effect on the environment.

As the Vice Mayor of the City of Sunnyvale, you typically participate in decisions regarding permits, rezoning, general plan amendments, and Environmental Impact Reports.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a “financial interest” in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official’s interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision.

Step One: Is the person a “public official?”

Public officials are defined as “every member, officer, employee, or consultant of a state or local government agency.” (Section 82048.)² Therefore, as Vice Mayor of the City of Sunnyvale, you are a public official.

Step Two: Are you making, participating in making, or influencing a government decision?

A public official “makes a governmental decision” when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Regulation 18702.1.) A public official “participates in a governmental decision” when, acting within the authority of his or her position and without significant intervening substantive review, the official negotiates, advises, or makes recommendations to the decisionmaker regarding the governmental decision. (Regulation 18702.2.) For a decision before the official’s own agency, a public official is attempting to use his or her official position to influence a decision if, for the purpose of influencing, the official contacts or appears before any member, officer, employee, or consultant of the agency. (Regulation 18702.3.)

For the purposes of this letter, we are assuming that as the Vice Mayor of the City of Sunnyvale, you wish to make and participate in decisions regarding permits, rezoning, general plan amendments, and EIRs. Since you are acting within the authority of your position and without significant intervening substantive review to advise and make recommendations regarding a governmental decisions, specifically related to permits, rezoning, general plan amendments, and an EIR, you are “participating in making” for the purposes of the Act.

² If a public official’s office is listed in Section 87200 and the official has a conflict of interest in a decision noticed at a public meeting, the official must: (1) verbally identify each type of interest involved in the decision as well as details of the interest, as discussed in Regulation 18702.5(b)(1)(B), on the record of the meeting and immediately prior to the discussion of the item; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item. For closed sessions, consent calendars, absences, and speaking as a member of the public regarding personal interests, special rules found in Regulation 18702.5 subdivisions (c) and (d) apply. (Section 87105.)

Step Three: What are your interests that may be affected by the decision?

Generally, to determine whether you have a disqualifying conflict of interest in any particular governmental decision, you must identify those interests that may be affected by the decision. Interests from which a conflict of interest may arise are defined in Section 87103 and Regulations 18703-18703.5 and include:

- An interest in a business entity in which the official has a direct or indirect investment of \$2,000 or more (Section 87103(a); Regulation 18703.1(a)); or in which the official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d); Regulation 18703.1(b).)
- An interest in real property in which the official has a direct or indirect interest of \$2,000 or more. (Section 87103(b); Regulation 18703.2.)
- An interest in a source of income to the official, including commission income, which aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)
- An interest in a source of gifts to the official if the gifts aggregate to \$440 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18703.4.)
- An interest in the official's personal finances, including those of the official's immediate family. This is known as the "personal financial effects" rule. (Section 87103; Regulation 18703.5.)

Of the interests recognized under the Act, those that may be implicated by your account of the facts include:

Real Property:

You have an interest in your condominium unit, which includes both the condominium unit as well as the common area of the unit. In regards to an interest in a condominium, the Commission has previously advised that the common areas surrounding a condominium complex has no separate marketable value from the condominium unit and therefore, the condominium unit is inseparable from the interest in the common areas. (*Munoz*, Advice Letter, No. I-07-129.)

Step Four: Are your interests directly or indirectly involved in the governmental decision?

Pursuant to Regulation 18704.2(a), a public official is directly involved in a governmental decision if the real property in which the official has an interest is located within 500 feet of the boundaries of the real property that is the subject of the decision. (Regulation 18704.2(a)(1).) You specified three decisions, two affecting the Raintree Site that are within, and one involving the Sares Site that has its legal boundaries beyond, 500 feet of your property.

The Raintree Site: As an initial question, we must determine if all the Raintree Site decisions (the special development permit, rezone, and general plan amendments to the northern and southern portions of the site) are interrelated such that they will be analyzed as a single question through the remainder of the eight-step process.

Regulation 18709(b) provides that “decisions are ‘inextricably interrelated’ when the result of one decision will effectively determine, affirm, nullify, or alter the result of another decision.” Where decisions are inextricably interrelated, a conflict with respect to one of the decisions will apply to the other as well.

You have provided no facts to indicate that the general plan decision on the southern portion of the Raintree Site is a separate and unrelated decision to the special development permit, and rezone of the site. Also, it appears that the decision on the general plan amendment to the southern portion of the site will affect those other decisions and, as a consequence, they are interrelated and will be analyzed as a single question.

Finally, because the condominium and the common area of your unit are considered a single property interest, you have an interest in real property which is located within 500 feet of the residential development at issue. Thus, pursuant to Regulation 18704.2(a)(1), your property is deemed to be directly involved in all the decisions affecting the Raintree Site.

The Sares Regis Site: In contrast, since the nearest boundary of your property is more than 500 feet from the Sares Regis Site, your property is deemed to be indirectly involved in these decisions. (Regulations 18704.2 and 18704.)

Steps Five and Six: Will there be a reasonably foreseeable material financial effect on your interests?

Once a public official has determined the materiality standard applicable to each of his or her interests, the next step is determining whether it is “reasonably foreseeable” that the standard will be met. A material financial effect on an interest need not be certain or even substantially likely to be “reasonably foreseeable,” but it must be more than a mere possibility. (Regulation 18706(a); *In re Thorner* (1975) 1 FPPC Ops. 198.)

The Raintree Site: In this case, since your real property interest (consisting of your unit and the common area) is considered directly involved in the decisions, the financial effect of the governmental decisions in issue is presumed to be material. (Regulation 18705.2(a)(1).) Generally, when an interest is directly involved in a decision and presumed to have a material financial effect on that interest, it is also clearly foreseeable (if not certain) that the interest will be affected by the decision unless you can show facts to the contrary. (*Ibid.*) No facts indicate that your real property interest will not be affected. Consequently, you are disqualified from the decision unless you can show that there will be no reasonably foreseeable material financial effect on the interest. Barring that, you may not make, participate in making, or influence a city

council decision regarding the proposed Raintree Site's special development permit, rezone and general plan amendment.

The Sares Regis Site: Since your property is indirectly involved in the decision, it is presumed under Regulation 18705.2(b) that the decisions will not have a material financial effect on your property. However, Regulation 18705.2(b) further provides:

“This presumption may be rebutted by proof that there are specific circumstances regarding the governmental decision, its financial effect, and the nature of the real property in which the public official has an economic interest, which make it reasonably foreseeable that the decision will have a material financial effect on the real property in which the public official has an interest. Examples of specific circumstances that will be considered include, but are not limited to, circumstances where the decision affects:

“(A) The development potential or income producing potential of the real property in which the official has an economic interest;

“(B) The use of the real property in which the official has an economic interest;

“(C) The character of the neighborhood including, but not limited to, substantial effects on: traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood”

We have no facts to consider whether the presumption of nonmateriality is rebutted. You should apply the standards in Regulation 18705.2 to your situation before participating.

Steps Seven and Eight: Does this governmental decision come within any exception to the conflict-of-interest rules?

Even if an official has a conflict of interest, disqualification is not required if the governmental decision affects the official's interests in a manner that is indistinguishable from the manner in which the decision will affect the public generally. (Section 87103; Regulation 18707(a).) Additionally, in certain rare circumstances, an official may be legally required to participate. Neither exception is implicated by your facts.

Segmentation

Regulation 18709(a) sets forth the requirements for segmentation of a decision that are not inextricably interrelated to each other as follows:

“An agency may segment a decision in which a public official has a financial interest, to allow participation by the official, provided all of the following conditions apply:

“(1) The decision in which the official has a financial interest can be broken down into separate decisions that are not inextricably interrelated to the decision in which the official has a disqualifying financial interest;

“(2) The decision in which the official has a financial interest is segmented from the other decisions;

“(3) The decision in which the official has a financial interest is considered first and a final decision is reached by the agency without the disqualified official's participation in any way; and

“(4) Once the decision in which the official has a financial interest has been made, the disqualified public official's participation does not result in a reopening of, or otherwise financially affect, the decision from which the official was disqualified.”

Another way to look at segmentation is to say that once the steps have been followed, the official may participate in certain decisions that merely “implement” decisions that have already been made so long as the remaining decisions will not result in reopening or in any way affect the decisions from which the official was disqualified and the remaining decisions will not independently have a material financial effect on the official's interests. (*Warne* Advice Letter, No. I-02-052; *Olson* Advice Letter, No. A-00-237.) If a particular decision is an implementation decision, it is possible that the official could participate in that decision regardless of a conflict of interest arising from another decision, provided the implementation decision does not independently create a conflict of interest.

Generally, potential conflicts of interest are analyzed on a decision-by-decision basis. However, because the Sares Regis site developer will be developing a joint EIR with the Raintree site developer, these decisions appear to be now interlinked because the two EIR decisions will effectively have the same determination. This is true even though the Sares Regis site developer is unrelated to the Raintree site developer because, pursuant to 18704.2(a)(5), you would be participating in making a decision relating to certifying the environmental document and redevelopment plans related to real property in which you have an interest. Therefore, you may not make, participate in making, or influence a city council decision regarding the Sares Regis site proposal.

Regarding decisions on the Sares Regis Site that relate to things other than the joint EIR, you may participate in them only if participating in that decision will not result in reopening or in any way affect the decisions of Raintree and will not independently have a material financial effect on your interest.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Emma Olson, Intern
Fair Political Practices Commission

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